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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1274

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC.,

Respondent,

—v.—

ABBOTT LABORATORIES, *et al.*,

Petitioners.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMERICAN HOSPITAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE AMERICAN HOSPITAL ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 42 of the Rules of this Court, the American Hospital Association hereby respectfully moves this Court for leave to file the attached brief *amicus curiae* in the above-captioned case. The brief is in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Counsel for the petitioners have consented to the filing of the attached brief. Counsel for the respondent have not consented to its filing.

The American Hospital Association

The American Hospital Association ("AHA") is a non-profit organization which represents some 7,500 institutional members (hospitals and other health care institutions) and more than 16,000 personal members. The purpose of the AHA is stated in its first bylaw:

> "[The AHA] object shall be to promote the welfare of the public through its leadership and its assistance to its members in the provision of better health care services for all the people."

The organization's principal interest is the care which patients receive from the hospitals of this country.

AHA provides a wide range of professional services in order to develop "better health services for all the people." It, along with the American College of Surgeons, the American College of Physicians, and the American Medical Association, is a sponsor of the Joint Commission on Accreditation of Hospitals, an organization which assists hospitals in their efforts to provide optimal levels of care. AHA conducts a considerable number of educational programs, such as workshops, institutes and meetings, to assist its members in providing efficient hospital care. It publishes and distributes substantial amounts of professional literature on the same subject. AHA conducts the most extensive data collection program in the hospital field and a wide range of hospital research projects.

AHA also represents its membership with respect to governmental matters before the Congress and such federal agencies as the Department of Health, Education and Welfare.

The Interest of the American Hospital Association as *Amicus Curiae*

The decision of the Court of Appeals for the Ninth Circuit is of profound significance to all nonprofit hospitals and the AHA. It is the first judicial application of the Nonprofit Institutions Act to hospitals. It has massive precedential consequences. The decision attempts to list every type of drug use by nonprofit hospitals and then to

determine, in broad and absolute terms, the application of the Act's Robinson-Patman exemption to each type of drug use. This is not a decision limited to a particular type of drug usage by a particular type of nonprofit hospital. The decision threatens to affect all nonprofit hospitals, not just in the Ninth Circuit, but all across the nation.

Yet it is the nonprofit hospitals whose interests have not been represented in the prior proceedings in this action. With all respect to the respondent assignee of various retail druggists, and to the petitioner drug manufacturers, it is the nonprofit hospitals represented by AHA that would feel the real brunt of the decision.

The Nonprofit Institutions Act was enacted to confer important benefits upon nonprofit hospitals, namely, the opportunity to purchase drugs and other supplies at special low prices so as to enable the hospitals to operate as inexpensively as possible. It is surely appropriate that the AHA be given the opportunity to convey to the Court its views with respect to the application of this important exemption to nonprofit hospitals.

The AHA believes that the decision is fundamentally unsound. It is inherently illogical. It relies on a rigid, categorical approach to determine which drugs are purchased for a hospital's "own use" and thereby qualify for the exemption, and which drugs do not qualify for the exemption even though they are used to treat sick people in the performance of admittedly proper hospital functions. The eight listed categories do not even cover the present range of hospital drug usage. And the arbitrary line of demarcation between exempt and nonexempt categories is never explained; it is in fact inexplicable.

The practical consequences of compliance with the decision would be enormous and costly. No matter how the

decision were implemented, it would result in higher drug costs, higher administrative costs and substantial disruption of services and supply procedures.

The AHA further believes that the decision of the Court of Appeals is premised on an inaccurate understanding of the functions of a hospital in contemporary society. Public and private health care experts, the Congress, and the federal health care agencies agree that the present gap in health care services can only be narrowed if the hospital becomes the primary source for total community health services. The decision is flatly inconsistent with the ongoing expansion of outpatient and ambulatory services by hospitals—a vital development in the delivery of health care in this country.

The AHA wishes to bring to the Court's attention these developments in hospital care and the experience and views of the nonprofit hospitals who would be affected by this decision most directly.

Accordingly, the American Hospital Association respectfully urges this Court to grant its motion for leave to file its brief as *amicus curiae*.

Respectfully submitted,

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BRIEF FOR AMERICAN HOSPITAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Interest of *Amicus Curiae*

The interest of the American Hospital Association as *amicus curiae* is set forth in the preceding motion for leave to file this brief.

Question Presented

Is the Nonprofit Institutions Act exemption for drugs purchased by nonprofit hospitals "for their own use" limited solely to drugs dispensed to inpatients and patients in the emergency clinic?

Statement of the Case

1. *The Proceedings Below*

Respondent, as the assignee of claims from sixty retail pharmacies, filed this action against twelve drug manufacturers seeking treble damages and injunctive relief. Respondent alleged, *inter alia,* that petitioners had engaged in unlawful price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. §13 *et seq.,* by selling drugs to nonprofit hospitals at prices lower than those offered to commercial retail pharmacies.

Petitioners moved for summary judgment on this claim on the ground that the Nonprofit Institutions Act, 15 U.S.C. §13c, exempts drug purchases by nonprofit hospitals from the application of the Robinson-Patman Act. The District Court agreed and granted petitioners' summary judgment motion on May 25, 1973. (Petitioners' Appendix B) The Court of Appeals for the Ninth Circuit, however, disagreed and vacated the judgment of the District Court on December 26, 1974. (Petitioners' Appendix A) The drug manufacturers thereafter filed a petition for rehearing, and the American Hospital Association sought to file a brief in support of their petition. On March 11, 1975, the Court of Appeals denied both the petition for rehearing and AHA's motion for leave to file its brief as *amicus curiae.* (Petitioners' Appendix C)

2. *The Decision of the Court of Appeals*

The Court of Appeals vacated the judgment below because it interpreted the scope of the Nonprofit Institutions Act ("the Act" or "Section 13c") more narrowly than the

District Court. The issue, as framed by the Court of Appeals, was whether each of eight categories of drugs purchased by hospitals was "for their own use" within the meaning of Section 13c. The appellate court concluded that only two categories—drugs dispensed to inpatients and to emergency clinic patients—were for the hospitals' "own use," and hence covered by the Section 13c exemption to the Robinson-Patman Act. The court conceded that the remaining six categories, including dispensation of drugs to outpatients at outpatient clinics, to departing inpatients as take-home prescriptions, and to other patients and users of medication, were "a proper and useful community service and thus can be regarded as a proper hospital function." (Petitioners' Appendix at A7) But the court held without explanation that such uses were not the hospitals' "own use" and therefore did not qualify for the Section 13c exemption:

> "Hospital use under §13c, in our judgment, must be limited to use made by the hospital in dispensing drugs for hospital or clinic treatment of in-patients or emergency patients. The purpose for which these supplies are purchased—the use to which they are to be put—is their consumption. Section 13c can apply here only to cases in which a hospital can be said to be the consumer. It cannot apply to cases of resale by the hospital to a private consumer." (Petitioners' Appendix at A7)

ARGUMENT

The instant case presents an extremely "important question of federal law which has not been, but should be, settled" by this Court:[1] whether the Nonprofit Institutions Act exemption for drugs purchased by nonprofit hospitals is limited solely to *horizontal* drug usage, that is, to drugs dispensed to inpatients and emergency clinic patients, and is inapplicable to *vertical* drug usage, that is, to drugs dispensed in outpatient clinics and in the course of other admittedly proper hospital functions.

The Court of Appeals for the Ninth Circuit has summarily concluded that only drugs dispensed to inpatients and emergency clinic patients qualify for the Robinson-Patman Act exemption, that all other uses of medications by hospitals are not "for their own use."

The ramifications of this extraordinary holding are enormous. It will boost the already high cost of medical care still higher. It will create a host of practical difficulties for the nation's hospitals. And it will hamper a vital development in the delivery of health care services—the expansion of outpatient and ambulatory services.

The impact of this decision will not be limited to the nation's hospitals and the patients whom they serve. All across the country, schools, colleges, universities, public libraries, churches and other charitable institutions, and their suppliers, will regard this decision as the authoritative interpretation of the Nonprofit Institutions Act. The Ninth Circuit's extraordinarily narrow interpretation will frustrate the beneficient purposes of the Act for all nonprofit institutions.

[1] Supreme Court Rule 19.

The decision is clearly wrong. It is based on an improper method of statutory construction. It relies on a rigid, categorical approach to drug use by hospitals which is illogical and inherently unworkable. The distinctions among the categories are indefensible. The arbitrary line of demarcation between the exempt categories and nonexempt categories is never explained.

The Ninth Circuit has cut back considerably on the benefits conferred by the Congress. Moreover, its exceedingly narrow reading of the Section 13c exemption has created uncertainty about the legality of all discounts granted to nonprofit institutions; the inevitable effect will be the erosion of Section 13c benefits.

In view of the enormous consequences of this erroneous decision for hospitals, schools, colleges, universities, public libraries, churches and charitable institutions, their suppliers, and the public, *amicus* respectfully urges that certiorari be granted.

I.

The Decision Presents an Important Question of Federal Law Which Has Not Been But Should Be Settled by This Court.

The Ninth Circuit decision propounds new law of profound precedential scope. The Nonprofit Institutions Act has been the subject of only one other judicial decision since its enactment in 1938. In that other decision, *Logan Lanes, Inc.* v. *Brunswick Corp.*, 378 F.2d 212, *cert. denied*, 389 U.S. 898 (1967), the Ninth Circuit interpreted the Act in broad and sympathetic fashion.[1] In the instant decision, the Ninth

[1] The Section 13c exemption was also mentioned in a footnote in *Students Book Co.* v. *Washington Law Book Co.*, 232 F.2d 49, 50-51 n.5 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956).

Circuit has interpreted the Act in narrow, radically different fashion. The decision, as the only current interpretation of Section 13c from any court in the land, promises to affect every beneficiary of the statute—every hospital, school, college, university, public library, church and charitable institution across the nation—and the suppliers of these institutions.

In the hospital field alone, the decision involves a federal question of considerable importance. The Court of Appeals has promulgated not a decision, but a doctrine. The opinion does not merely determine the applicability of the Section 13c exemption to a particular drug sale, or a particular hospital, in particular factual circumstances. Instead, the decision attempts to identify every type of drug use by hospitals, and to grant or deny the Section 13c exemption to each identified type of use in absolute, categorical fashion.

We do not, however, urge the Court to grant certiorari simply because the decision below determines an important federal question. We respectfully submit that the Ninth Circuit has decided this important federal question incorrectly. Unless the Court agrees to review the decision, the nonprofit institutions of this nation, their suppliers, and the public, will be left vulnerable to its adverse impact.

The Decision Is an Anachronism

The decision of the Court of Appeals is incompatible with the functions of a hospital in contemporary society. It holds that the Section 13c exemption, permitting special, low prices to nonprofit hospitals, should be confined to the principal activities performed by hospitals nearly 40 years ago. Without reference to the realities of modern-day practice, the Court of Appeals has determined that only drugs provided by hospitals to inpatients and emergency clinic patients may be said to have been purchased by the hospital for its "own use," within the meaning of Section 13c. All other hospital uses of drugs and other hospital supplies—such as drugs used by hospitals in treating outpatients—though conceded to be "proper hospital function[s]" are nevertheless held to be outside the scope of the exemption.

This frozen definition of a hospital's "own use" of drugs is inconsistent with the broad beneficent purposes of the statutory exemption. The legislative history of the Nonprofit Institutions Act makes clear that the purpose and justification for the exemption lay in the nonprofit character of the beneficiary institutions listed in the law, not in the particular activities of such institutions in 1938.[1]

Congress intended to enable the listed nonprofit institutions "to operate as inexpensively as possible."[2] Congress did not intend to limit a nonprofit institution's "own use" of supplies to those particular activities which schools,

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[1] H.R. Rep. No. 2161, 75th Cong., 2d Sess. (1938); S. Rep. No. 1769, 75th Cong., 2d Sess. (1938).

[2] *Logan Lanes, Inc.* v. *Brunswick Corp.*, 378 F.2d 212, 216 (5th Cir.), *cert. denied*, 389 U.S. 898 (1967).

libraries, churches and hospitals were in fact conducting on the date of enactment of Section 13c.[1] Such static statutory construction would substantially impair the ability of the beneficiary institutions to continue to operate inexpensively under the changed circumstances which inevitably come with the passage of time.[2]

If the beneficent purpose of the Act is to be realized, if public service institutions are to "operate inexpensively," as the Congress intended, the exemption must be coextensive with the present-day functions of the beneficiary institutions.

The Decision Draws Distinctions Which Are Arbitrary and Illusory

The decision holds that drugs are purchased for the hospital's "own use" and are entitled to the Section 13c exemption only when the drugs are consumed by persons lying in a horizontal position—in a hospital bed or in the emergency clinic. The drugs consumed by persons in a vertical position—upon discharge from the hospital or in an outpatient clinic—are denied the Section 13c exemption. This makes no sense.

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[1] Though not as predominant or important as they are today, outpatient departments were nevertheless an integral part of the hospital forty years ago. In 1941, one physician wrote, "It is almost superfluous to emphasize that the pharmacy and out-patient department are among the most essential services of a hospital." Merrill, *Hospital Pharmacy and Out-Patient Department*, Hospitals at 33 (June 1941). *See also*, Martin, *Control of Out-Patient Service and Charges*, Hospitals at 85 (September 1942); Clarke, *Medications for Outpatients*, 20 Hospitals 60 (September 1946).

[2] *See Eastern Kentucky Welfare Rights Organization, et al.* v. *Simon*, 507 F.2d 1278 (D.C. Cir. 1974).

Even if hospitals provided only inpatient care, this distinction would be arbitrary. But in light of the functions of a modern hospital—where outpatient care is an integral and growing part of hospital health care service—the distinction is absurd.

Hospitals necessarily use drugs in treating inpatients and outpatients. The hospital's use of drugs in treating inpatients and outpatients is identical. In neither case does the hospital "consume" the drug. In both cases it is the patient—inpatient or outpatient—who does so. In both cases the hospital is engaging in a "proper hospital function," as the Court of Appeals conceded. By what logic, then, can the Section 13c exemption be accorded to drugs used to treat inpatients but denied to drugs used to treat outpatients?

The decision confers the Section 13c exemption upon drugs used in the emergency clinic but denies the exemption to drugs used in the outpatient clinic. Yet study after study has shown that, in most urban hospitals, the emergency clinic serves for all practical purposes as an outpatient clinic.[1] On what rational basis, then, can it be determined that drugs provided to patients in the emergency clinic are for the hospital's "own use," whereas drugs provided to patients in a hospital outpatient clinic are not?

The rigid lines drawn between inpatients and outpatients, between emergency clinics and outpatient clinics, and between other exempt and nonexempt categories are nowhere explained in the decision.

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[1] Bodenheimer, *Patterns of American Ambulatory Care*, VII Inquiry 26, 33 (September 1970); Perkoff and Anderson, *Relationship Between Demographic Characteristics, Patient's Chief Complaint, and Medical Care Destination in an Emergency Room*, VIII Medical Care 309 (1970) and studies cited therein.

The Categorical Approach of the Court of Appeals Is Unworkable

Surely the availability of the exemption for drug purchases should not turn on where the sick person swallows his pill, or whether he takes his pill while lying down or standing up. The scope of the Section 13c exemption should be determined in entirely different fashion.

The controlling question should be the primary purpose of the purchase by the hospital: is it for the treatment of hospital patients or the performance of other legitimate hospital functions? If so, the Section 13c exemption should apply.

This functional approach to Section 13c was utilized, ironically, by the Ninth Circuit in *Logan Lanes, Inc.* v. *Brunswick Corp.*, 378 F.2d 212 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967). In that case it was established that the "primary purpose" of the purchase of bowling alley equipment by a university was to "fulfill the needs" of that nonprofit institution; accordingly, the Court of Appeals ruled as a matter of law that the purchase was for the institution's "own use" and entitled to the Section 13c exemption. The court accepted without challenge the judgment of the institution as to how it should conduct its activities, finding it unnecessary to inquire into collateral uses of the purchased supplies.[1]

[1] The Internal Revenue Service has adopted a similarly sensible test for determining whether a hospital is engaging in an unrelated business through its sale of drugs to various persons. The IRS test is whether the drugs are sold to *patients* of the hospital. Inpatients, outpatients, discharged patients, patients receiving medical services as part of a home care program or in an extended care facility—all have been deemed to be "patients" of the hospital. Rev. Rul. 68-376, 1968-2 Cum. Bull. 246. The IRS test would work equally well in regard to Section 13c.

By contrast, the decision in the instant case would apparently require judicial scrutiny of all uses of all supplies purchased by nonprofit institutions. The categorical test would compel courts to separate out (1) uses for proper institutional purposes and (2) "for their own use" uses; only the latter would be entitled to the Section 13c exemption.

Such a test would flatly contradict the will of Congress. And it would create open-ended uncertainty among tens of thousands of nonprofit institutions, and their suppliers.

The Court should not abandon those who must live with this decision on a daily basis. Unless certiorari is granted, nonprofit institutions and their suppliers will not know where they stand with respect to Robinson-Patman Act exposure. Uncertainty regarding such liability may force suppliers to discontinue or modify their special low prices to nonprofit institutions, thereby frustrating the beneficent purposes of the Section 13c exemption. Nonprofit institutions themselves, fearful of Robinson-Patman liability, may be obliged to buy at higher commercial prices, to the detriment of the communities these institutions serve.

Section 13c would thus become a nullity.

II.

The Decision, If Not Reviewed by This Court, Will Have Serious Adverse Impact Upon Nonprofit Hospitals and the General Public.

If the Court does not review the decision at this time, nonprofit hospitals and those who receive and pay for hospital care will be immediately and adversely affected.

Adverse Consequences to Hospitals

Section 13c was intended to confer substantial benefits upon hospitals and other nonprofit institutions. The decision of the Court of Appeals, however, would convert Section 13c benefits into burdens of considerable consequence.

How would a hospital attempt to comply with the decision? We see only four possibilities, all of them objectionable:

(1) A hospital could set up and maintain dual inventories and distribution systems for drugs and other hospital supplies, one "for their own use" uses, and the other for other proper hospital uses. The substantial costs and burdens of a double inventory system are obvious. It would require duplication of all supply functions and procedures—requisitions, bidding processes, purchase orders, accounting records, inventory, storeroom space, personnel and so on—for the 1800 to 4500 different drugs and dosage forms typically stocked by a hospital pharmacy and for the many other supplies which hospitals purchase. The burden would be even greater in the large hospital which operates a number of separate pharmacies within the hospital in order to distribute drugs more effectively.

(2) Alternatively, a hospital might be obligated to trace the uses to which a single inventory of hospital pharmaceuticals or other supplies is put, subsequently securing a rebate for items allocated to "for their own use" uses, or paying a surcharge for items allocated to other proper purposes. This arrangement, however, would be an administrative nightmare. Keeping track of the use to which all hospital supplies are put would be an extraordinary undertaking in view of the quantity of drugs and other supplies stocked by the hospital. Moreover, hospitals obtain their supplies from a variety of sources—manufacturers, wholesalers, and combinations of both. Also, it is common for hospitals to purchase a single product from more than one supplier. It would be an extraordinary chore to determine which supplier owes a rebate to the hospital or is due a surcharge from the hospital.

(3) A hospital could simply pay higher prices for *all* of its prescription drugs and other supplies. This alternative would considerably increase the cost of hospital operations, which are already high, and inevitably result in higher hospital bills to hospital patients and the public.

(4) Finally, a hospital might, at least in theory, eliminate its "nonexempt" functions, *e.g.*, its outpatient clinic and ambulatory care services. Such a solution, however, would be completely contrary to vital current trends in health care. The hospital today occupies the central position in the health care system. It is no longer just an inpatient care facility; it is now a health center "encompassing and integrating the wide range of comprehensive

medical services—prevention, treatment, rehabilitation, and after-care."[1] The hospitals of this country have responded to the growing demand for more and better health care services by expanding their outpatient and ambulatory services. (Petitioners' Appendix D) The Federal Government has strongly supported the development.[2] Expansion of outpatient and ambulatory services is the only practical means for providing better health care to more people at lower cost. Only by the increased use of ambulatory facilities can the widening gap in the provision of health care services be narrowed and the exploding cost of health care be brought under control. Yet, the decision below would deny the Section 13c exemption to drugs (and presumably other supplies) used in such essential hospital operations.

The decision of the Court of Appeals, if allowed to stand, would thus confront nonprofit hospitals with a series of extraordinarily onerous and unacceptable alternatives.

More distressing, still, is the danger that drug manufacturers and other hospital suppliers may feel compelled by the decision to discontinue all Section 13c special low prices. Sellers may simply be unwilling to risk any Robinson-Patman exposure. Should suppliers take this course, the purpose of the Section 13c exemption will have been totally frustrated.

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[1] H.M. AND A.R. SOMERS, MEDICARE AND THE HOSPITALS—ISSUES AND PROSPECTS 43 (1967); *see also*, Editorial, *The Hospital's Responsibility for Primary Care*, 2 Hospital Medical Staff 1 (January 1973).

[2] *See generally*, NATIONAL ADVISORY COMMISSION ON HEALTH FACILITIES—A REPORT TO THE PRESIDENT (1968); DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, A REPORT TO THE PRESIDENT ON MEDICAL CARE PRICES (1967); National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 93d Cong., 2d Sess.; Public Health Service Amendments of 1968, Pub. L. No. 90-574, 82 Stat. 1005; Hill-Burton Amendment of 1970, 42 U.S.C. § 291c(a)(5).

Adverse Consequences to the Public

No matter which course the hospital and its suppliers might take as a result of the decision below, the impact upon the public would be the same: higher hospital costs. The cost of hospital care will inevitably rise if hospitals must maintain double inventories, or pay higher prices for their supplies, or incur needless additional administrative expenses, or lose Section 13c prices entirely.

The Government, and ultimately, the taxpayer would be obliged to pay more for hospital care. Medicaid costs, which cover outpatient prescription costs, would increase. The Government cost of financing various health programs administered by nonprofit hospitals—such as the migrant health program, 42 U.S.C. § 242(h), and the Indian health program, 42 U.S.C. § 2002—would also increase. Should Medicare be extended to cover outpatient prescriptions, the cost of that program would increase as well.

In fiscal year 1972-73, the Federal Government and the state governments spent $670 million for the drugs and drug sundries provided in connection with national health programs.[1] This amount would rise significantly if the Section 13c exemption were limited in the fashion prescribed by the Court of Appeals.

The extraordinary impact of this decision on the cost of health care alone surely warrants a grant of certiorari. When the impact of this decision is multiplied by all the nonprofit institutions serving communities across the nation, the urgency of Supreme Court review becomes all the more apparent.

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[1] 37 Soc. Sec. Bull. No. 2, Table 2, p. 7 (February 1974).

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges that this Court grant a writ of certiorari.

Respectfully submitted,

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